

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY L. GOTCHALL

Claimant

VS.

SCHWAN'S SALES ENT. INC.,

Respondent

AND

HARTFORD INS. CO. OF THE MIDWEST

Insurance Carrier

Docket No. 1,039,143

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 3, 2009, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Pamela J. Fuller. Mitchell W. Rice, of Hutchinson, Kansas, appeared for claimant. Dustin J. Denning, of Salina, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident arising out of and in the course of his employment with respondent on December 20, 2008, and that claimant gave timely notice of his injury. Respondent was ordered to pay for claimant's medical treatment.

The record on appeal consists of the transcript of the August 11, 2008, Preliminary Hearing and the exhibits; the transcript of the January 28, 2009, deposition of Scott Vinduska and the exhibits; the transcript of the January 28, 2009, deposition of Roy Bielser; and the Notice of Stipulations filed February 2, 2009, together with the pleadings contained in the administrative file.

ISSUES

Respondent asserts that claimant testified that he was injured on December 27, 2007, at 5 p.m. while unloading a semi. Respondent further contends that when confronted with evidence that claimant was not working at 5 p.m. on December 27 and,

further, that no semi was unloaded on December 27, claimant amended his Application for Hearing to set out a date of injury of "[o]n or about 12/27/07."¹ Respondent argues that claimant's amended date of accident does not cure the original defects and that he failed to sustain his burden of proof that he sustained personal injury by accident on or about December 27, 2007, that arose out of and in the course of his employment.

Claimant argues that although he was initially mistaken about the date of injury, the evidence proves he was injured in the course of his employment on a Thursday in December 2007 and that he subsequently reported the injury to respondent's facility supervisor. Accordingly, claimant requests the ALJ's Order for Medical Treatment be affirmed.

The issue for the Board's review is: Did claimant suffer personal injury by accident that arose out of and in the course of his employment with respondent on or about December 27, 2007, or December 20, 2007?

FINDINGS OF FACT

Claimant filed an Application for Hearing on March 11, 2008, in which he stated he injured his left shoulder while unloading a semi-truck on December 27, 2007. At the preliminary hearing, claimant testified that on December 27, 2007, at about 5 p.m. he was in the back of a semi unloading. As he moved a case of fish, he pulled something in his shoulder. He continued to unload the semi and finished working his shift. He testified he was alone in the semi at the time he was injured.

Claimant testified that he tried to report his injury to his supervisor, Scott Vinduska, the next day. He claims he told Mr. Vinduska that he hurt his shoulder unloading the semi, but Mr. Vinduska "kind of giggled, walked around, checked the oil in the truck, and that was the end of that."² Claimant testified he again attempted to report his injury to Mr. Vinduska on December 30. Mr. Vinduska came out of his office, and claimant told him he hurt his shoulder unloading the semi. Claimant said that Mr. Vinduska did not say a word and just walked back into his office. Claimant said he then spoke with Roy Bielser, saying he tried to tell Mr. Vinduska about hurting his shoulder. Claimant testified that Mr. Bielser stated that respondent "got a perfect safety record here. They don't want to ruin it."³

Mr. Bielser testified that claimant may have mentioned a shoulder injury to him, but if so he does not recall it. He does not remember claimant telling him he had injured his shoulder while unloading a semi. The first time he knew claimant was claiming a work-

¹ Amended Application for Hearing filed Aug. 12, 2008.

² P.H. Trans. at 7.

³ P.H. Trans. at 9.

related shoulder injury was in March 2008 when he saw claimant at a convenience store and claimant said he was going to pursue a workers compensation claim. He also said he does not recall telling claimant that respondent had a perfect safety record. He said he would not have access to that kind of information. Mr. Bielser was a coworker of claimant. He was not claimant's supervisor.

Claimant stated he was terminated on January 14, 2008, for reasons not related to his work injury. At the time of his termination, claimant requested medical treatment. Respondent sent him to Dr. Jenny Niblock, and claimant saw her on January 17, 2008. He gave her a history of a left shoulder injury with an onset of December 27, 2007.

Claimant agreed that respondent's payroll records show that on December 27, 2007, he clocked in at 9:07 a.m. and out at 1:12 p.m. He returned to work that day and clocked back in at 9:02 p.m. and out again at 10:28 p.m. Claimant agreed that he was not clocked in to work at 5 p.m. Claimant testified that he did not look at his watch or clock at the time he was injured, and the 5 p.m. time was just a guess.

Mr. Vinduska testified he is the facility supervisor at respondent. He testified that no semi trailer was unloaded on December 27, 2007. The last semi unloaded before December 27 was on Thursday, December 20. The next time a semi came in to be unloaded was on January 3, 2008.

Mr. Vinduska testified that claimant was terminated on or about January 14, 2007. He said that about a week earlier, claimant had clocked in at work, left work, and then came back and clocked out. He visited with claimant on January 13 about the incident. On January 14, he and respondent's district manager met with claimant. It was during this meeting that claimant was told he was being suspended. Mr. Vinduska testified that upon hearing he was being suspended, claimant said, "This is going to work out great, because now I can get my shoulder looked at, and collect unemployment."⁴ Mr. Vinduska said this was the first time claimant reported a work related injury, and claimant specifically said that he was injured on December 27, 2007. Mr. Vinduska said the district manager asked claimant five or six times about the date to make sure claimant had the correct date. Mr. Vinduska said he went back and checked the records that night and realized that no semi was unloaded on December 27.

During the meeting on January 14, claimant told the district manager that he reported the injury to Mr. Vinduska on December 28. Mr. Vinduska said claimant said something about his shoulder hurting, but claimant never attributed it to his work activities. He does not recall what date claimant told him about his shoulder pain. He said that claimant had complained to him previously about his back hurting him and also said his feet hurt him because he had gout. Claimant never said those problems were caused at

⁴ Vinduska Depo. at 6.

work. Mr. Vinduska also said that he does not recall claimant telling him on December 30 that he had hurt his shoulder unloading a semi. He said that according to respondent's work log, claimant did not work on December 30.

On August 12, 2008, the day after the preliminary hearing, claimant filed an Amended Application for Hearing setting out a date of accident of "[o]n or about 12/27/07."

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁷

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

⁵ K.S.A. 2008 Supp. 44-501(a).

⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁷ *Id.* at 278.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ANALYSIS

Claimant testified at the preliminary hearing that he injured his left shoulder at work on December 27, 2007. This is also what he told his supervisors on January 14, 2008, when he asked for medical treatment. He testified that he reported his injury to his supervisor, Scott Vinduska, the next day on December 28, 2007, and again on December 30, 2007. The employer authorized claimant to see Dr. Niblock. The Injury Form signed by claimant shows a date of injury of December 27, 2007.¹⁰ In fact, all of the medical records introduced into evidence at the August 11, 2008, preliminary hearing show an injury date of December 27, 2007. Claimant never testified he was injured on December 20, 2007. Claimant said that the time of day he was injured was an estimate, but he never said he could be mistaken about the day of the month. Claimant only testified that he was injured on December 27, 2007. The evidence that claimant was injured on December 27, 2007, was contradicted by the evidence that claimant was not at work at 5 p.m. on December 27, 2007, and, more significantly, that no trucks were unloaded on December 27, 2007. There is no testimony in this record that claimant was injured at work on December 20, 2007.

CONCLUSION

Based on the record presented to date, claimant has failed to prove that he suffered a personal injury by accident arising out of and in the course of his employment with respondent on either December 27, 2007, or December 20, 2007.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Medical Treatment of Administrative Law Judge Pamela J. Fuller dated February 3, 2009, is reversed.

⁸ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁹ K.S.A. 2008 Supp. 44-555c(k).

¹⁰ P.H. Trans., Cl. Ex. 1, the January 17, 2008, record of admission from Citizens Medical Center, shows a "Prev Adm Date 12/26/07."

IT IS SO ORDERED.

Dated this _____ day of April, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Dustin J. Denning, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge